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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 12

WESTERN PACIFIC RAILROAD COMPANY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the three-judge district court (R. 730–734) is reported at 230 F. Supp. 852. The opinion of the Interstate Commerce Commission (R. 623–645) is reported at 316 I.C.C. 795.

JURISDICTION

The judgment of the three-judge district court was entered on June 22, 1964 (R. 730). Appellants filed a notice of appeal to this Court on August 17, 1964, and a jurisdictional statement on October 16, 1964. Probable jurisdiction was noted on January 18, 1965 (R. 742; 379 U.S. 956). Jurisdiction to review the

decision of the district court is conferred by 28 U.S.C. 1253 and 2101(b). *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81.

QUESTION PRESENTED

The defendant railroads were charged with rate discrimination in violation of Section 3(4) of the Interstate Commerce Act by reason of their refusal to enter into through routes and joint rates via Portland with the Bieber route, of which the complainant Western Pacific Railroad Co. is a part, while entering into such through routes and rates with the Bieber route's competitor, the Southern Pacific Co. The question presented is whether the Interstate Commerce Commission correctly held in these circumstances that Western Pacific could not invoke Section 3(4), prohibiting rate discrimination "between connecting lines," on the ground that, since Western Pacific had no direct physical connection with the defendants and the defendants had not previously established through routes with it, Western Pacific was not a "connecting line" within the meaning of the Act.

STATUTE INVOLVED

Section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4)) provides:

> All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and

delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

STATEMENT

This case arises out of a complaint (R. 1), filed by the Western Pacific Railroad Co. with the Interstate Commerce Commission, charging the defendants, the Union Pacific Railroad Co. and the Northern Pacific Railway Co., with violating Section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)).[1] Section 3(4) prohibits carriers from discriminating "in their rates, fares, and charges between connecting lines." The Commission dismissed the complaint (R. 623), finding, *inter alia*, that Western Pacific was not a "connecting line" entitled to invoke Section 3(4) against the defendants in this case. The district court affirmed the dismissal on this basis (R. 729), without investigating the existence of the alleged discrimination. The question presented, therefore, is whether Western Pacific would have a remedy under Section 3(4) if it were able to establish prohibited rate discrimination against it by the defendants.

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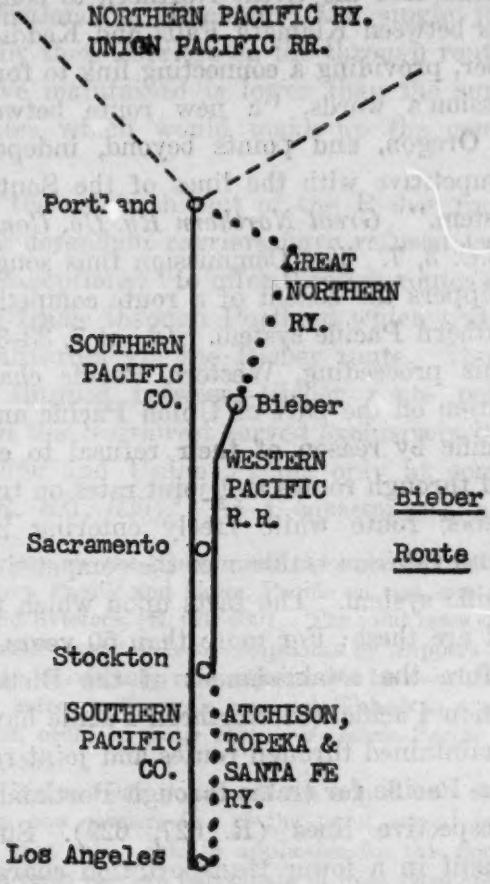
[1] The complaint also charged violations of Section 1(4) of the Act (49 U.S.C. 1(4)), but Western Pacific no longer presses this charge.

The conclusion of the Commission and the district court that Western Pacific was not a "connecting line" or part of a "connecting line" entitled to invoke Section 3(4) was largely based upon the geographical configuration of the railroads involved. A detailed map of all of the relevant railroad routes is reproduced at page 329 of the Record in this Court. We here state the relevant relationships in simple form.

The Union Pacific and Northern Pacific railroads provide rail service between the Pacific Northwest (the States of Washington, Oregon and Idaho) and Portland, Oregon. From Portland, two principal competitive railroad routes run south to California. One of these routes consists exclusively of the track of the Southern Pacific Co. south from Portland to Sacramento, Stockton and Los Angeles. The competitive route to the south from Portland is the so-called "Bieber route" (or the "Inside Gateway"). The Bieber route is not owned entirely by one railroad, as is the Southern Pacific route, but is made up of track of three different railroad companies: (1) the Great Northern Railway Co. from Portland to Bieber, California; (2) the complainant Western Pacific from Bieber to Stockton, California; and (3) the Atchison, Topeka & Santa Fe Railway Co. from Stockton to Los Angeles and other southern California points. Both the Southern Pacific and the Bieber route connect with the Union Pacific and the Northern Pacific at Portland. In California, the track of the Southern Pacific and the Bieber routes is frequently intertwined or closely parallel, the two

routes serve many of the same points, and in almost all places they serve the same immediate geographic area. In schematic form, the relevant routes look as follows:



The Bieber route has existed as an alternative to the Southern Pacific only since 1931. Before that time, the track of the Great Northern and the Western Pacific did not meet at Bieber, but stopped at

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Klamath Falls, Oregon, to the north of Bieber, and at Keddie, California, to the south. In 1930, however, over the protests of the Southern Pacific and the Union Pacific, the Commission authorized the Western Pacific and the Great Northern to construct extensions between Klamath Falls and Keddie to meet at Bieber, providing a connecting link to form, in the Commission's words, "a new route between California, Oregon, and points beyond, independent of and competitive with the lines of the Southern Pacific system." *Great Northern Ry. Co. Construction*, 166 I.C.C. 3, 7. The Commission thus sought to afford shippers the benefit of a route competitive with the Southern Pacific system. *Id.*, at 7, 33–35, 37, 39.

In this proceeding, Western Pacific charges discrimination on the part of Union Pacific and Northern Pacific by reason of their refusal to enter into so-called through routes and joint rates on traffic over the Bieber route while freely entering into such routes and rates on traffic over the competitive Southern Pacific system. The facts upon which the claim is based are these: For more than 50 years, starting well before the establishment of the Bieber route, both Union Pacific and Northern Pacific have voluntarily maintained through routes and joint rates with Southern Pacific for traffic through Portland between their respective lines (R. 627, 629). Such joint rates result in a lower transportation charge to the shipper who ships over the through route covered by the joint rates than would apply if joint rates were not in effect. Without joint rates, for example, traffic from Olympia, Washington (on the Northern Pa-

cific), to Stockton, California (on the Southern Pacific), would pay a rate (called a combination rate) made up of Northern Pacific's local rate from Olympia to Portland and Southern Pacific's local rate from Portland to Stockton. The single joint rate offered by these carriers on the through routes which they have maintained is lower than the sum of the local rates which would make up the combination rate.

Since the establishment of the Bieber route, however, the defendant carriers have refused (with very narrow exceptions) [2] to offer through routes and joint rates on traffic through Portland which travels to or from California via the Bieber route. Thus, traffic can be shipped between Bieber route points and points in the Northwest served exclusively by Northern Pacific and Union Pacific only at combination rates (R. 627, 629).[3] As a consequence, a shipper

[2] Joint rates via the Bieber route through Portland exist with the Northern Pacific and Union Pacific on cast iron pipe, automobiles and livestock (R. 629–630). The joint rates on pipe and on automobiles resulted from complaints by shippers (dismissed pursuant to satisfactory rate adjustments between the parties). The joint rates on livestock were established as a result of a Commission order in *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555.

[3] If the Bieber route portion of the trip is over the track of more than one carrier, *i.e.*, if the point served is south of Bieber, a joint rate would be applicable for this portion, since the Bieber route carriers participate in joint rates among themselves for traffic over the route (R. 627, n. 3). The total rate would thus be a combination rate made up of the Bieber route joint rate and a defendant's local rate north of Portland, which would be higher than the joint rate maintained by the defendant with the Southern Pacific.

placing a shipment between a California point served both by the Bieber route and by Southern Pacific and a Pacific Northwest point served exclusively by Union Pacific or Northern Pacific will automatically ship via Southern Pacific rather than the Bieber route to get the benefit of lower joint rates applicable on the through routes maintained by the defendants with Southern Pacific.[4] Indeed, as the examiner noted in the proceeding before the Commission, the Bieber roads "are even deprived of traffic which they themselves originate" (R. 652), which is switched to Southern Pacific for the line haul in order to take advantage of the joint rates not available over the Bieber route (R. 26, 95–96, 628, 632).[5] At the hear-

[4] The Bieber route is competitive with the Southern Pacific route only with respect to movements to and from northwestern points not served exclusively by defendants, but also served by the Great Northern, one of the Bieber route participants. On such traffic, the Great Northern participates in joint rates with both the Southern Pacific and the Western Pacific (R. 627). Where points are served by the Great Northern in common with the Northern Pacific or the Union Pacific, the Great Northern's joint rates, in which the Bieber route traffic participates, are competitive with the joint rates which the latter maintain with the Southern Pacific.

[5] This occurs because the Western Pacific switching charge plus the Southern Pacific joint rate with Northern Pacific or Union Pacific are less than the combination of the Bieber route rate to Portland plus the Northern Pacific or Union Pacific local route rate to the destination (R. 118, 359–402). The Commission noted that in 1961, after one shipper on Western Pacific's line at a common point with Southern Pacific sought to have through rates established over the Bieber route to Northern Pacific and Union Pacific destinations in order to avoid Western Pacific's switching charge, Southern Pacific agreed to absorb the switching charge, thus retaining the line haul (R. 628). This situation, which results from the rate main-

ing before the Commission, it was estimated that the Bieber route's lack of access to joint rates on points served exclusively by Northern Pacific or Union Pacific deprives the three Bieber roads of the revenues from hauling about 25,000 cars per year (R. 90, 632). There was also evidence that attempts to locate new industrial plants on Western Pacific's lines had been discouraged by the unavailability of joint rates with the Northern Pacific and Union Pacific (R. 82–84).

Western Pacific commenced this proceeding by filing a complaint with the Commission in February, 1961 (R. 1), charging Northern Pacific and Union Pacific with violations of Section 1(4) [4] and 3(4) of the Act and seeking the establishment of joint rates with the defendants via the Bieber route and Portland. The other roads making up the Bieber route—

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tained by the defendants, seems contrary to the legislative policy embodied in Section 15(4) of the Act, which provides that "in prescribing through routes the Commission shall * * * give reasonable preference to the carrier by railroad which originates the traffic."

[4] Section 1(4) (49 U.S.C. 1(4)) does not turn on discrimination but generally requires carriers "to establish reasonable through routes" with other carriers at "just and reasonable rates," a duty which the Commission "shall" enforce under Section 15(3) (49 U.S.C. 15(3)) by establishing such routes and rates "whenever deemed by it to be necessary or desirable in the public interest." The Commission declined to exercise this power in this case, basing its decision upon its conclusions that existing service appeared to be adequate, that the Bieber route was slower and costlier than the Southern Pacific route, and that the requested routes would result in short-hauling the defendants on some traffic, in violation of Section 15(4) (R. 644). The district court did not review this decision, apparently because the Section 1(4) claim had been abandoned by Western Pacific.

Great Northern and Santa Fe—were nominally made defendants, but they responded by stating their willingness to participate in the joint rates sought (R. 8–9, 11–12). These carriers presently participate in joint rates with Western Pacific over the Bieber route (R. 627, n. 3). Southern Pacific intervened in opposition to the complaint (R. 14–15).

After a hearing, which included extensive shipper testimony in support of the complaint, the examiner held that the failure to offer the Bieber roads joint rates competitive with Southern Pacific was "an unlawful discrimination in violation of Section 3(4) of the act and should be removed" (R. 655). Division 2 of the Commission reversed (R. 645). It held that Section 3(4) could not be invoked by Western Pacific since it prohibits discrimination only "between connecting lines" and the complaining carrier, in the Commission's view, was not a "connecting line." Admittedly, Western Pacific did "not physically connect with the defendants," since the Bieber route's "connection is made by the Great Northern at Portland" (R. 641), *i.e.*, Western Pacific was the middle segment rather than the northernmost segment of the Bieber route. The Commission then held, on the basis of this Court's decision in *Atlantic Coast Line R. Co.* v. *United States,* 284 U.S. 288, 293, that the term "connecting line" was not limited to lines touching the discriminating line, but also covered "all the lines making up a through route" (R. 641). Such a "through route" would exist only if all "the participating carriers hold themselves out as offering through transportation service" (*Thompson* v. *United States,* 343 U.S.

549, 557; R. 642). On this basis, the Commission concluded that Western Pacific, since it lacked a direct physical connection with defendants, would be a "connecting line" "only if the present routes [maintained by the defendants with Western Pacific] constitute through routes" (R. 641). However, it was clear that "the defendants have not solicited nor encouraged the movement of traffic over the routes sought, but for more than 30 years have tried to keep those routes commercially closed" (except for the few joint rates noted in footnote 2, *supra*) (R. 643). Thus "no effective through routes exist" and Western Pacific was, in the Commission's view, not a "connecting line" entitled to invoke Section 3(4) (R. 643).[7]

The three-judge district court affirmed, agreeing with the Commission's reasons for holding Western Pacific not to be a "connecting line." (R. 730–734). The court regarded its decision as compelled by *Atlantic Coast Line R. Co.* v. *United States, supra,* and *Thompson* v. *United States, supra,* noting that "[a]ny further liberalization of the present definition [of "connecting line"] will have to come from the Supreme Court" (R. 734).

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[7] The Commission further held that even if Western Pacific was a connecting carrier, it had not shown "similarity of circumstances and conditions which justifies equality of treatment" under Section 3(4) (R. 643). The Commission apparently based this conclusion on its factual finding that "[t]he routes sought through Bieber and Portland are longer and involve more difficult operating conditions than the Southern Pacific route, and they require hauls in a general direction opposite to the direct movement" (R. 641). The district court did not review this finding that discrimination did not exist, finding the issue one which "this Court need not and does not reach" (R. 731, n. 3).

SUMMARY OF ARGUMENT

The Commission and the district court have held that a carrier is a "connecting line" entitled to invoke Section 3(4) only (1) if it has a direct physical connection with the allegedly discriminating carrier, or (2) if the discriminating carrier has, in the past, entered into through routes with the complainant. Where the complaining carrier owns the middle segment of a route against which discrimination is directed and where the defendant has steadfastly refused to offer through transportation in common with the complaining carrier, the Commission and district court would wholly deny relief. This view is unduly narrow: It creates a series of anomalous results, not dictated by the language of the statute, which have no relationship to the purposes to be served by Section 3(4) and it permits discrimination to destroy competition contrary to the purposes of the statute. In contrast, the statutory purposes and language are fully served, and the anomalies disappear, under the proper definition of "connecting line"—that a line is a "connecting line" if it is part of a *route* which connects with the defendant, all participants in which stand ready to cooperate in offering through transportation with the defendant.

The Commission and the district court do not seek to justify their definition of "connecting line" by reference to the purposes of the statute but find their restrictive result compelled by this Court's decision in *Atlantic Coast Line R. Co.* v. *United States,* 284 U.S. 288, 293. In fact, the *Atlantic Coast Line* deci-

sion supports the broader definition which we submit, since it did not emphasize the existence of a prior voluntary through route between the complainant and the *defendant,* as the Commission would hold necessary when a direct physical connection is absent, but focused on the existence of through routes between the complainant and the other carriers making up the connecting route, as we do here. The definition which we offer is also consistent with prior decisions (while the Commission's definition is not) and it furthers the Commission's original purpose in creating the connecting Bieber route to establish a route competitive with the Southern Pacific system.

ARGUMENT

THE WESTERN PACIFIC IS A "CONNECTING LINE" ENTITLED TO INVOKE SECTION 3(4) TO REMEDY DEFENDANTS' ALLEGED DISCRIMINATION AGAINST THE BIEBER ROUTE

Section 3(4) of the Interstate Commerce Act prohibits a carrier from discriminating in its rates, fares and charges "between connecting lines." Since the Interstate Commerce Commission and the district court have held that Western Pacific, the complainant here, is not a "connecting line" and therefore cannot invoke Section 3(4) even if the appellees are proved to have in fact practiced discrimination against the Bieber route, the issue before this Court concerns the meaning of the term "connecting lines."[8]

[8] If Western Pacific is a "connecting line", as we contend, it would be the Court's normal practice to remand the case for further consideration of the question of discrimination, a question, resting on the evaluation of particular facts, which the Commission did not treat in detail and which the district court

On this issue, it is common ground that the term includes more than those carriers which have an immediate physical connection with the carrier charged with discrimination. If there had ever been doubt on this score, the point was settled by *Atlantic Coast Line R. Co.* v. *United States,* 284 U.S. 288, 293, where the Court held (affirming the Commission and largely duplicating its language (see 165 I.C.C. 3, 15)):

> There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with [the carrier charged with discrimination] * * *. The term is commonly used as referring to all the lines making up a through route.

The Commission and the district court recognized that the Western Pacific cannot therefore be denied the protection of Section 3(4) in this case merely because it lacks an immediate physical connection with the defendants. They have, however, excluded Western Pacific from the Act's antidiscrimination protection through a definition of "connecting lines" only slightly less narrow than one focusing exclusively upon physical connection. On the basis of the above quotation, the Commission and the district court have held that a carrier complaining of rate discrimination against it by another carrier can invoke Section 3(4) only if it shows either a direct physical connection with the discriminating carrier, or that the discriminating

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did not consider at all. *E.g., Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542. Some comment upon the Commission's brief rejection of the discrimination claim here is, however, contained in footnote 18, *infra*, p. 30.

carrier has previously entered into a "through route" with the complainant. For this purpose, the Commission and the court have defined "through route" in the sense in which that term is used in *Thompson* v. *United States*, 343 U.S. 549, *i.e.*, as requiring a showing that, prior to the complaint, the defendant carrier voluntarily held itself out as generally offering through transportation in common with the complaining road. In this case, the complaint is precisely that the defendants have, in the past, steadfastly refused to offer such through transportation in common with the Bieber route while offering through routes with the Southern Pacific system. Hence, there are no existing "through routes" in the *Thompson* sense between complainant and defendants. Since Western Pacific also lacks an immediate physical connection with defendants, the Commission and the district court would consequently afford no relief, regardless of circumstances showing that the Western Pacific is part of a connecting system of carriers (the Bieber route) capable of offering through transportation with defendants but for their rate discrimination favoring the competing Southern Pacific.

In our view, this reading of the Act by the Commission and the district court is unduly narrow: It bears no relationship to the purpose of preserving competition which the Act was designed to serve and, in its application here, it denies protection to a railroad which is the victim of discrimination for the arbitrary reason that the road happens to occupy the central rather than the end segment of a route, the

whole of which is prejudiced by discrimination favoring a competing carrier. We submit instead that a carrier is a "connecting line" within Section 3(4) when it is one of the roads forming a continuous route connecting with the carrier requested to join in establishing non-discriminatory rates, so long as all the participants in the continuous connecting route are willing to cooperate in providing through transportation in combination with the defendant. Such a "line" connecting with the Northern Pacific and the Union Pacific at Portland is formed by the Bieber route, composed of successive segments of the Great Northern Railway, the Western Pacific, and the Atchison Topeka & Santa Fe Railway, all of which are willing to cooperate with the defendants in this case in providing through service by way of Portland. Indeed, through service at joint rates is in fact provided today by those Bieber route carriers on traffic over their own lines up to their connection with the defendants.[9]

We believe it was in this sense of a line which was part of a *route* connecting with the defendant that the *Atlantic Coast Line* case spoke of "connecting lines" "as referring to all the lines making up a through route." We therefore find it unnecessary in this case to consider, as did the Commission and the district court, whether "through routes" as defined by *Thompson* v. *United States, supra,* have existed between the Bieber route and the defendants before the commencement of the present proceedings. If pre-

[9] See footnote 8, *supra,* p. 7.

existing through routes affects the disposition of this complaint, the relevant routes would be those among the Bieber route carriers, not those between the Bieber route and the defendants, and; as we have said, such through routes among the Bieber carriers did, in fact, exist.

We now seek to show, in detail, why we believe the definition of "connecting lines" adopted by the Commission and the district court to be inconsistent with the purposes of the Act, while the definition which we offer in its place would vindicate the statutory aims.

A. THE COMMISSION'S DEFINITION IS ARBITRARY IN RELATION TO THE PURPOSES OF THE ACT

An evident purpose of Section 3(4)'s prohibition of rate discrimination "between connecting lines"—part of a series of statutory prohibitions against "every variety of unjust discrimination" [10]—was to prevent such discrimination from eliminating or interfering with competition between railroads. We address our-

[10] The prohibition of discrimination "between connecting lines" was part of the original 1887 Act, aimed at dealing with widespread discriminatory practices in railroading (S. Rep. 46, 49th Cong., 1st Sess., pp. 182, 215). Shortly prior to the Act, this Court had held, in *Atchison, Topeka & Santa Fe R. Co.* v. *Denver & New Orleans R. Co.*, 110 U.S. 667 (1884), that neither the common law nor the Constitution of Colorado required a railroad in Colorado to accord to one connecting railroad a system of rates and other business relationships which it gave to another competing connecting railroad; but that such an obligation could properly be imposed by legislation similar to English statutes and legislative and constitutional provisions in effect in other States. In the original Act, present Section 3(4) constituted the second (unnumbered) paragraph of Section 3. The first paragraph of the original Section 3 was the forerunner of the present Section 3(1) which prohibits discrimination against persons and localities (49 U.S.C. 3(1)). In discussing Section 3

selves first to the arbitrary nature of the Commission's definition of "connecting lines," in relation to this purpose. This is illustrated most readily by considering three situations comparable in all important respects to the present case, but in which the Commission's definition of "connecting lines" would give relief while denying it here because of factors entirely irrelevant to the statutory purpose.

(1) Were the situation here precisely reversed, *i.e.*, were the defendants discriminating in *favor* of the

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of the original bill on the Senate floor, the Chairman of the Select Committee on Interstate Commerce stated (17 Cong. Rec. 3472 (1886)):

> The third section is broader and more general in its terms, * * * it contains a general prohibition of every variety of unjust discrimination. The section covers two subjects * * *. The second part of the section is modeled in part upon the English and in part upon similar statutes in several of the States. Its purpose is to require railroads to furnish to connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' a connecting line by refusing to accept traffic from it or deliver traffic to it upon any terms, as has been done.

In 1891, the Interstate Commerce Commission expressed its understanding of the nondiscrimination provision of Section 3(4) as follows:

> When, therefore, the statute declares thaat there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the statute it is only a meaningless enactment [*New York & Northern Ry. Co.* v. *The New York & New England R.R. Co.*, 4 I.C.C. 702, 720].

Bieber route and against the Southern Pacific by establishing through routes and joint rates with the Bieber route carriers to and from points in California while denying them to the Southern Pacific, it is clear that, under the Commission's definition, Southern Pacific could make full use of the remedy provided in Section 3(4). Southern Pacific has a direct physical connection with the defendants at Portland; the Commission would thus hold all the track of Southern Pacific running through California from Portland to be a "connecting line" with the defendants (R. 641). Similarly, the Great Northern, the Western Pacific and the Santa Fe would all be "connecting lines" with defendants at Portland under the Commission's view—the Great Northern because its track touches that of the defendants at Portland, and all three roads because of the previous voluntary maintenance with them by the defendants of "through routes" through Portland (R. 641–642). Thus, there would be no question but that Southern Pacific, were it the prejudiced road, could demand under Section 3(4) to participate in joint rates with defendants on a nondiscriminatory basis as compared with the Bieber route.

(2) Even with the discrimination placed as it is in this case, if the Great Northern were the complaining railroad, rather than the Western Pacific, the Commission's definition would hold it entitled to precisely the relief sought here by the Western Pacific. The Great Northern touches the defendants at Portland and thus, like the Southern Pacific, it is a "connecting line" with defendants at that point under the

Commission's definition. As a "connecting line," the Great Northern would be entitled under Section 3(4) to participate in joint rates over its line to and from California points on a nondiscriminatory basis as compared with the Southern Pacific, even if those points lie at places on the Bieber route beyond the Great Northern's segment of track.[11] (This assumes that the Western Pacific and the Santa Fe would hold themselves ready to join in such rates with the Great Northern to and from California points on the Bieber route, just as the Great Northern and the Santa Fe hold themselves ready to do in this case in combination with the Western Pacific).

(3) With the discrimination placed as it is in this case, the result here would also be different under the Commission's definition if the defendants had, in the past, voluntarily held themselves out as generally offering transportation through Portland over the Bieber route with the Bieber route carriers. In such a case the Commission would hold that the Western Pacific had been part of a pre-existing "through route" with the defendants and was thus now a "connecting line" entitled to invoke Section 3(4) (R. 641-642). Thus if the defendant's joint rates with the Bieber route were discriminatorily higher than those with the Southern Pacific, or if the defendants decided to abandon existing through routes with the Bieber carriers altogether while retaining joint rates with the Southern Pacific, Western Pacific would be entitled to invoke Section 3(4).

[11] Unless the Commission so held, it would permit discrimination against a concededly "connecting line."

The Commission and the district court have therefore, in effect, held, (1) that the Southern Pacific could attack rate discrimination favoring the Western Pacific—but that the Western Pacific has no reciprocal right; (2) that all the remedies sought here could be obtained by the Great Northern—but not by the Western Pacific—although the two roads suffer jointly from the discrimination alleged; and (3) that the Western Pacific could complain if the defendants discriminatorily increased or terminated pre-existing joint rates—but cannot complain where the defendants have wholly refused such joint rates through discrimination.

These distinctions make no sense in terms of the purposes to be served by an anti-discrimination provision, nor have the Commission and the district court sought to justify their unduly limited definition of "connecting lines" by reference to those purposes. Instead, they rely exclusively for their definition upon what they deem to be this Court's view of the meaning of "connecting lines" in *Atlantic Coast Line R. Co.* v. *United States,* 284 U.S. 288, 293. As we next show, however, *Atlantic Coast Line* did not establish the definition adopted by the Commission and district court; on the contrary, it reflected substantially the definition of "connecting line" which we now offer, namely, that a line is a "connecting line" if it is part of a route which connects with the defendant so long as all participants in the connecting route stand ready to offer through transportation between the route and the allegedly discriminating carrier.

B. THE COMMISSION'S DEFINITION IS UNSUPPORTED BY THE ATLANTIC COAST LINE DECISION, WHICH REFLECTS THE DEFINITION WHICH WE URGE

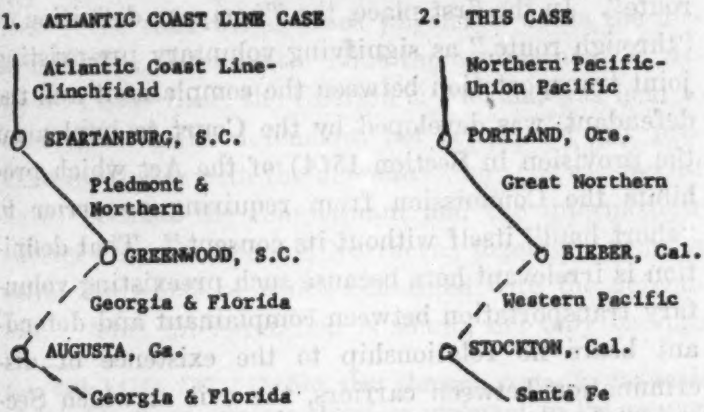
The *Atlantic Coast Line* case arose out of a lease of the Clinchfield Railway by the Atlantic Coast Line, the lease having been approved by the Commission on the express condition that the lessee permit the Clinchfield's line to be used as a link for through traffic by carriers "connecting with the line of the Clinchfield, * * * without discrimination" (284 U.S. at 292). Subsequently, a claim under the lease was advanced by the Georgia & Florida Railroad, which did not touch the Clinchfield, but connected with the Piedmont & Northern, which in turn connected with the Clinchfield. The Georgia & Florida objected to tariffs filed by Atlantic Coast Line as lessee, which sought to eliminate joint rates between points on the Clinchfield and Augusta, Georgia, on the Georgia & Florida. Discrimination was alleged because the Atlantic Coast Line proposed, meanwhile, to maintain joint rates to Augusta via the Clinchfield and a subsidiary of the Atlantic Coast Line which was competitive with the Georgia & Florida.

This Court, in an opinion by Mr. Justice Brandeis, affirmed the Commission's order which found that the Atlantic Coast Line's proposed tariff violated the condition in the lease protecting lines "connecting with the Clinchfield" against discrimination. The Court disposed of the issue whether the Georgia & Florida was a "connecting line" as follows (284 U.S. at 293):

> The argument is that the Georgia & Florida does not connect, since its own rails do not

physically abut on the Clinchfield's rails—the connection being made over the Piedmont & Northern, an intermediate carrier. There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with Clinchfield. The term is commonly used as referring to all the lines making up a through route.[12]

The physical situation of the Western Pacific *vis-a-vis* the defendants in this case is identical, for the purposes relevant here, with that of the Georgia & Florida *vis-á-vis* the Clinchfield in *Atlantic Coast Line,* as the following schematic maps show:



The Commission and the district court, however, have deemed the last sentence of the quoted excerpt

[12] While the *Atlantic Coast Line* decision dealt with construction of "connecting lines" in a Commission order rather than in the Act, the Commission, in a subsequent opinion dealing with the same railroads, *Georgia & Florida R.* v. *Atlantic Coast Line*, 191 I.C.C. 489, 492, 500, found that the defendants' discriminatory refusal to permit the Georgia & Florida and the Piedmont & Northern to participate in joint rates was a discrimination in rates between connecting lines in violation of Section 3(3) (amended in 1940 as present Section 3(4)) as well as discrimination in violation of the lease.

from the *Atlantic Coast Line* opinion to hold that, if a complaining railroad does not have a direct physical connection with the defendant, it can be a "connecting line" only if the defendant railroad has, in the past voluntarily established a "through route" with the complainant as that term is used in *Thompson* v. *United States*, 343 U.S. 549.

Apart from the fact that this sentence cannot easily be read in context as intending a *limitation* upon the concept of what constitutes a "connecting line," the Commission and the district court have misconstrued the Court's reference to the relevance of a "through route". In the first place, the *Thompson* definition of "through route," as signifying voluntary pre-existing joint transportation between the complainant and the defendant, was developed by the Court to implement the provision in Section 15(4) of the Act which prohibits the Commission from requiring a carrier to "short haul" itself without its consent.[13] That definition is irrelevant here because such preexisting voluntary transportation between complainant and defendant bears no relationship to the existence of discrimination between carriers, the evil at which Section 3(4) is directed. Indeed, the alleged discrimination may well be, as it is in this case, the very failure in the past to offer transportation in connection with the complainant.[14]

[13] The "short haul" prohibition of the statute is made specifically inapplicable to cases of discrimination arising under Section 3. See the first sentence of Section 15(4) (49 U.S.C. 15(4)).

[14] The Commission itself indicated in *Sioux City & New Orleans Barge Lines, Inc.* v. *Chicago & North Western Ry.*

Secondly, insofar as through routes between carriers are relevant to a discrimination complaint, the Commission is in error with respect to which carrier relationships are important. In the Commission's view, it is crucial whether the complainant and the *defendant* have voluntarily maintained a "through route" prior to the discrimination complaint. It seems more likely, however, that in focusing upon the relevance of a "through route," the Court in *Atlantic Coast Line* had reference to the existence of routes, not between the complainant and the defendant, but between the complainant and the "intermediate carrier"—the road whose track physically abuts the discriminating defendant. Thus the complainant in *Atlantic Coast Line,* the Georgia & Florida, was held to connect with the defendant, not because of any preexisting routes with the *defendant,* but (as we suggest here) because the complainant and the intermediate carrier (the Piedmont & Northern) together formed a route the whole of which connected with the defendant.[15] This interpretation is sound, not only because

Co., 303 I.C.C. 537, 547, 549, that through routes in the sense of the *Thompson* case are therefore irrelevant to the question raised by this appeal.

[15] This analysis of the *Atlantic Coast Line* decision is corroborated by the result reached by the Commission in *Georgia & Florida R.* v. *Atlantic Coast Line*, *supra*, n. 12. That case was a sequel to the first *Atlantic Coast Line* case, involving the same parties and the same connecting point. The Commission found a violation of Section 3(3) (amended in 1940 as present Section 3(4)) despite a lack, which the decision expressly notes, 191 I.C.C. at 492, 500, of existing through routes via the connecting point. This second *Atlantic Coast Line* decision is thus directly contrary to the position now taken by the Commission.

the Court's opinion does not dwell on the pre-existing relationship between complainant and defendant, as the Commission has done here, but also because it avoids a principal anomaly caused by the Commission's interpretation, namely, that a defendant, by consistently and discriminatorily refusing to offer joint rates with another road, can successfully insulate itself against a charge of discrimination under Section 3(4).[16]

C. THE DEFINITION WHICH WE URGED IS SUPPORTED BY DECISIONS IN OTHER CONTEXTS UNDER THE ACT

The definition of "connecting line" which we thus urge is consistent with decisions bearing upon the meaning of those words in other situations where charges of discrimination have been brought under the Act. For example, in dealing with discrimination by railroads against water carriers, Section 3(4) has been applied where there was concededly no direct physical connection between the complainant and the defendant and where the railroads had, as in this case, wholly refused to enter into through routes or joint rates with the complaining barges.[17] In addi-

[16] Since the discriminatory refusal to enter into through routes is a violation of Section 3(4), *Dixie Carriers* v. *United States*, 351 U.S. 56; *Sioux City & New Orleans Barge Lines, Inc.* v. *Chicago & North Western Ry. Co.*, 303 I.C.C. 537, the Commission has, in effect, held that a past violation of Section 3(4) privileges a present violation.

[17] *American Barge Line Co.* v. *Alabama Great Southern Railroad Company*, 306 I.C.C. 167, 172 (1959), affirmed *sub nom. Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kan., 1961); *cf. Sioux City & New Orleans Barge Lines, Inc.* v. *Chicago & North Western Ry. Co.*, 303 I.C.C. 537 (1958). See also *Oregon Short-Line & U. N. Ry.*

tion, in *Chicago, I. & L. Ry.* v. *United States*, 270 U.S. 287, this Court held that the Commission had correctly condemned the discriminatory refusal by several railroads to maintain reciprocal switching agreements with another road as against the contention that the Act was inapplicable because the defendant neither connected nor maintained any joint service with the complainant. The Court's opinion—written, as was the opinion in *Atlantic Coast Line, supra*, by Mr. Justice Brandeis—has direct application to the present case (270 U.S. at 292–293):

> The steam railroads contend that, in effect, the order [of the Commission] directs them to establish through routes and joint rates, or to allow a common use of terminals; that such extensions of service can legally be made only upon a finding that public necessity and convenience require them, * * * and that, without making such a finding, the Commission has, under the guise of a discrimination order, compelled them to extend their service. It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no joint service is being rendered by the three steam railroads with the South Shore, there cannot, in law, be unjust

Co. v. *Northern Pac. R. Co.*, 61 Fed. 158, 159 (C.A. 9), in which the Ninth Circuit entertained a claim under Section 3(4) even though the Oregon line did not have a "direct" connection with Northern Pacific, but reached it over the leased lines of a terminal company.

discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier.

The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to remove the discrimination by any appropriate action. *American Express Co.* v. *Caldwell,* 244 U.S. 617, 624; *United States* v. *Illinois Central R.R. Co.,* 263 U.S. 515, 521. Direct physical connection with the carrier subjected to prejudice is not an essential. *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U.S. 136, 144. Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. *United States* v. *Pennsylvania R.R. Co.,* 266 U.S. 191, 197–9. * * *

D. THE COMMISSION'S RESULT IS INCONSISTENT WITH ITS OWN PURPOSES IN CREATING THE BIEBER ROUTE

Finally, we note that the Commission's result here is particularly inappropriate in view of the Commission's purpose in originally bringing the Bieber route into existence—the belief that there was a particular public need for a railroad route competitive with the Southern Pacific in California. In authorizing the construction which created the Bieber route (*Great Northern Ry. Co. Construction,* 166 I.C.C. 3, 33–34) the Commission stated:

San Francisco and Portland are now connected directly by the rails of but a single car-

> rier. The California Railroad Commission points out that this dependence upon the ability of a single rail carrier is without parallel as between comparable agricultural and industrial centers anywhere in the United States. * * * Generally speaking, the only part of California which now has the benefit of rail competition to or from points in Oregon and Washington is a small area around Los Angeles served by the Union Pacific. With the construction of the proposed line this area would be extended to include all points in California served by the Santa Fe and the Western Pacific.

This purpose to extend the area which "has the benefit of rail competition to or from points in Oregon and Washington" "to include all points in California served by the Santa Fe and the Western Pacific" is significantly frustrated by the Commission's present view which, by permitting defendants to discriminate against the Bieber carriers, insulates the Southern Pacific from effective competition on all California traffic to or from points in the Northwest served only by Union Pacific or Northern Pacific.

In sum, the Commission's view makes ineffective the general statutory purpose of protecting competition from the dampening effects of discrimination and the more particularized purposes of the Commission in initially establishing the Bieber route. In contrast, the definition which we offer—that a line is a "connecting line" entitled to challenge rate discrimination against it under Section 3(4) if it is part of a route which connects with the defendant and which is ready to offer through transportation in combination with the defendant—fully respects the statutory

limitation of protection to "connecting lines" while advancing both the general statutory purpose and the specific competitive function of the Bieber route.[18]

[18] We have not discussed in the body of the brief the question, not reached by the district court, whether the Commission correctly decided that defendants have not been guilty of discrimination against the Bieber route. Some comment upon the Commission's resolution of this issue does, however, seem appropriate in light of the views stated by the Commission on that point. The Commission found that "[e]ven if the complainants were connecting carriers, the evidence of record does not establish the similarity of circumstances and conditions which justifies equality of treatment" (R. 643). It apparently based this finding upon its factual conclusion that "[t]he routes sought [by Western Pacific] through Bieber and Portland are longer and involve more difficult operating conditions than the Southern Pacific route, and they require hauls in a general direction opposite to the direct movement." (R. 641.) The basis of the Commission's conclusion is thus not entirely clear, but the Commission's language does contain a suggestion that operating conditions on the Bieber route if not as favorable as operating conditions on the Southern Pacific route, might well justify the defendants in wholly refusing to participate in joint rates with the Bieber route while fully participating in such rates with the Bieber route's competitor. See also the Commission's opinion in *Denver & R.G.W.R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611, 658. While some operating conditions on the Bieber route, for example those affecting the feasibility of making the connection between the defendants' lines and the Bieber route or those affecting the ability of the defendants' or the Bieber carriers to gain a fair return on traffic interchanged between the defendants and the Bieber route, might justify the defendants in offering no joint rates whatever with the Bieber route, the mere length or difficulty of the Bieber route would not alone appear to provide such a justification, so long as the defendants are able to obtain adequate divisions of such joint rates and so long as the defendants are not compelled to offer sub-standard transportation which might potentially destroy their good will. We note in this connection that the same differences in operating conditions south of Portland

CONCLUSION

The judgment below should be reversed and the case remanded to the district court for consideration of the Western Pacific's claim of discrimination under Section 3(4).

Respectfully submitted.

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AUGUST 1965.

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found relevant by the Commission in this case did not prevent the Commission from permitting Western Pacific to maintain a competitive level of rates with Southern Pacific for the purpose of meeting water competition (*Pacific Coast Fourth Section Applications* 190 I.C.C. 273); nor have those differences precluded competitive joint rates on some commodities (see note 4, *supra*). The choice between the Bieber route and the Southern Pacific route, in light of the natural advantages and disadvantages of each, is a choice basically to be made by shippers, not by the defendants. Insofar as the Commission's brief treatment of this issue indicates otherwise, we suggest that it is erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 12

WESTERN PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The unanimous opinion of the three-judge district court (R. 730-734) is reported at 230 F. Supp. 852. The opinion of the Interstate Commerce Commission (R. 623-645) is reported at 316 I.C.C. 795.

JURISDICTION

The judgment of the district court dismissing the complaint was entered on June 22, 1964 (R. 730), and

the notice of appeal was filed on August 17, 1964 (R. 735). Probable jurisdiction was noted on January 18, 1965 (R. 742; 379 U.S. 965). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b). *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81.

QUESTION PRESENTED

Western Pacific Railroad Company charged that the appellee railroads, Northern Pacific Railway Company and Union Pacific Railroad Company, are engaging in rate discrimination in violation of Section 3(4) of the Interstate Commerce Act, in that they refuse to enter into joint rates with Western Pacific via Portland, Oregon, while doing so with the Southern Pacific Co., although Western Pacific neither physically connects with the defendant railroads at Portland nor participates in through routes with the defendant railroads via Portland. The question presented is whether the entire Interstate Commerce Commission and the unanimous district court have properly interpreted the provision of Section 3(4) prohibiting rate discrimination between "connecting lines", in holding that Western Pacific cannot invoke Section 3 (4) because it is not a connecting line with the defendant railroads at Portland in that it neither physically connects with them at that point nor participates with them in through routes through that point.

STATUTE INVOLVED

Section 3(4) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. § 3(4), provides:

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Although Sections 1(4) and 15(3) of the Act are not directly involved in this appeal, their relationship to Section 3(4), to the complaint of Western Pacific, and to the issue here on appeal, is significant. For the convenience of this Court, they are set forth in the Appendix, pp. 40-41, *infra*.

STATEMENT

This case arises out of a complaint (R. 1) filed by the Western Pacific Railroad Co. with the Interstate Commerce Commission. Western Pacific alleged that the Union Pacific Railroad Co., the Northern Pacific Railroad Co., the Great Northern Railway Co. and the Atchison, Topeka and Santa Fe Railway Co. failed and refused to establish and maintain joint rates and through routes with Western Pacific via Bieber, California, and Portland, Oregon, for traffic

moving between points in Oregon, Washington and Idaho, on the one hand, and points in California, on the other. Western Pacific charged that this failure and refusal violated the requirement of Section 1(4) of the Interstate Commerce Act, 49 U.S.C. § 1(4), that every railroad "establish reasonable through routes with other such carriers, and just and reasonable rates, fares, and charges, and classifications applicable thereto". Western Pacific also charged that this failure and refusal resulted in a violation of the provision of section 3(4) of the Act, 49 U.S.C. § 3 (4), which states that railroads "shall not discriminate in their rates, fares, and charges between connecting lines". The relief sought was an order "requiring said defendants to establish, put in force, maintain and apply in the future * * * just, reasonable, nondiscriminatory and competitive joint through rates, charges and practices and through routes." (R. 8).

The existing route and rate situation (R. 626-628) consists of two major routes, called the "Bieber" or "Inside Gateway" route and the "Southern Pacific" route between California points and points in the three-state northwestern area. The Southern Pacific route consists of the Southern Pacific (or, initially Santa Fe, then Southern Pacific) from California to Portland, thence Northern Pacific, Union Pacific or Great Northern to and from points in the northwestern area. The existing Bieber route consists of Santa Fe to Stockton, California, thence Western Pacific (or Western Pacific initially) to Bieber, California, thence Great Northern to and from northwestern points, either via Portland and Vancouver for points west of

the Cascades or east from Wishram along the Columbia River to points east of the Cascades. Western Pacific and Great Northern have joint rates over the Bieber route on the same general basis as the joint rates also maintained by the participants in the Southern Pacific route.[1] The joint rates over the Southern Pacific through route via Portland have existed for over 50 years, whereas the joint rates over the Bieber through route have existed since its construction, or for some 30 years.

In essence, Western Pacific sought to have the Commission order the opening of a new through route and establishment of joint rates over such through route on the same basis as the joint rates over the existing Southern Pacific and Bieber through routes. This new through route would consist of Santa Fe to Stockton (or, initially, Western Pacific), Western Pacific to Bieber, Great Northern to Portland, and then either Northern Pacific or Union Pacific to and from points in the northwestern area.

Northern Pacific and Union Pacific, and their subsidiaries, denied the allegations of the complaint. (R. 9, 10). The Great Northern and Santa Fe answered the complaint with expressions of willingness to establish and maintain the routes and rates sought. (R. 8, 11). Southern Pacific intervened in opposition to the complaint. (R. 14).

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[1] In addition to the Southern Pacific and Bieber routes, the Chicago, Milwaukee, St. Paul and Pacific Railroad Co. maintains joint rates with Western Pacific over routes through Bieber. (R. 627).

definition fully comports with the statutory purpose, and that any further expansion of the term is not warranted." (R. 734). Accordingly, the district court found it to be unnecessary to rule on appellants' further contention that the Commission erred in its conclusion that the record did not establish the similarity of circumstances and conditions requisite to entitle Western Pacific to equality of treatment as to rates.

SUMMARY OF ARGUMENT

The entire Commission and an unanimous three-judge court have held that in order for a railroad to be a "connecting line" within the protection of the provision against rate discrimination in Section 3(4) of the Interstate Commerce Act, it must have either a direct physical connection with the allegedly discriminating carrier at the point of discrimination or, absent that, participate in through routes through that point with such carrier. Appellants and the Department of Justice seek to unduly broaden that definition of connecting lines, in a way never before contended in the 75 year history of Section 3(4), to encompass any possible participant, no matter how remote, in physically available routes reaching the point at which discrimination is alleged to occur. Such an interpretation does violence to the Congressional purpose underlying the provisions of Section 3(4) and its relationship to Sections 1(4) and 15(3) of the Act. There is nothing in the language, legislative history, or statutory context of Section 3(4), or in the common

law or statutory milieu in which it was enacted, which remotely supports appellants' or the Department's proposed definitions. To the contrary, it would seem that the framers of the statutory language had actual physical connection between complainant and defendant in mind.

The Commission and the district court referred to this Court's decision in *Atlantic Coast Line R.R.* v. *United States*, 284 U.S. 288, for the proposition that absent direct physical connection, one railroad may be considered to be a "connecting line" of another if they participate in through routes. Appellants and the Department misread that decision as supporting their much broader interpretations of the term. This Court was not there considering, as appellants contend, some loose concept of physically available service up to, but not through, the point of connection with the discriminating carrier. Rather, it is quite clear that in that proceeding the parties, the Commission, the lower court, and this Court were dealing with, and speaking of, the complainants as connecting lines of the discriminating carrier because they were participants in existing published through routes with that carrier. The later cases with which appellants seek to buttress their interpretation of *Atlantic Coast Line* afford them no support.

If this Court disagrees with the definition of connecting line employed by the Commission and the district court, this case should be remanded to the district court for the resolution of the remaining, primarily factual, issues, which, in sustaining the Com-

mission's ruling on the status of Western Pacific, the lower court found no reason to reach.

ARGUMENT

I. Western Pacific Is Not a "Connecting Line" With Northern Pacific and Union Pacific at Portland, Oregon, Within the Meaning of Section 3(4) of the Interstate Commerce Act

Section 3(4) of the Interstate Commerce Act provides that railroads "shall not discriminate in their rates, fares, and charges between connecting lines * * *". It further provides that "As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter [*i.e.*, railroads] or any common carrier by water subject to [Part III of the Interstate Commerce Act]. Appellant Western Pacific contends that Northern Pacific and Union Pacific violate Section 3 (4) by maintaining a system of joint rates with Southern Pacific via Portland, Oregon, where they physically connect, on traffic between points in California, on the one hand, and points in Oregon, Washington and Idaho, while refusing to do so via the so-called Bieber route in which Western Pacific is an intermediate carrier, although it is 490 miles short of a physical connection with Northern Pacific and Union Pacific at Portland. The Commission found that Western Pacific was not a "connecting line" with Northern Pacific and Union Pacific at Portland because it had neither a physical connection with them nor through routes and rates with them via Portland. Here, as in the court below, Western Pacific contends

that by the words "connecting line" as used in Section 3(4), Congress intended to describe (and protect from rate discrimination) any "continuous series of lines where the traffic on one could physically move onto the tracks of the others" (App. br., p. 19). We submit that this contention that Section 3(4) protects possible "routes" and makes each carrier in such a route a connecting line with the railroads at the possible interchange point (*e.g.* with Northern Pacific and Union Pacific at Portland), does violence to the Congressional purpose.

The statutory language and pattern. Section 3(4) prohibits a railroad from practicing rate discrimination between its "connecting lines", and the latter term is defined in that section as "the connecting line of any [railroad]". This language, on its face, relates to segments of railroad which connect, rather than to every carrier which is embraced in a possible multi-carrier route which ultimately "connects". Such a reading of the clause in question is confirmed by the preceding clause of Section 3(4) which requires railroads to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivery of passengers and property to and from connecting lines". Obviously, this duty of providing adequate interchange facilities with "connecting lines" refers to lines which "connect" in the sense that interchange is feasible—*i.e.*, a physical track connection or a sufficient proximity to permit a feasible transfer of lading—as from a barge through a grain elevator to railroad cars. There is no basis

Hearing was had before an examiner of the Commission. Santa Fe and Great Northern neither took an affirmative position nor submitted evidence for complainant; Southern Pacific did take a position against the granting of relief and introduced evidence in opposition to Western Pacific's case. (R. 625). Following the hearing, Western Pacific, although emphasizing the Section 3(4) issue, sought findings of violation of both Section 1(4) and Section 3(4). (R. 505). In his report and recommended order, the examiner took the position that he need not reach the Section 1(4) issue of whether the Commission should order the establishment of through routes because plaintiff primarily argued, and he found, a Section 3 (4) violation. (R. 654-655). The basis for his finding of a Section 3(4) violation appeared to be a finding of "connecting line" status for Western Pacific growing out of the existence of a few joint through rates via Portland and the Bieber route on cast iron pipe, automobiles, livestock and class rated traffic.

The Commission reversed the examiner. As the Commission noted, although Western Pacific had by now "indicated a willingness to rely alone on the alleged violation of section 3(4)" it had not withdrawn its Section 1(4) allegations nor its request for "the prescription of through routes", a remedy related to a Section 1(4), rather than 3(4), violation. (R. 643-644). Therefor, the Commission ruled on both issues.

On the Section 1(4) issue the Commission found (R. 644):

> * * * On the basis of this record, we cannot find that the public interest would be served by re-

> quiring the establishment of joint rates and through routes which are substantially slower and costlier than the present routes.

On the Section 3(4) issue, after a lengthy discussion of the law and the facts (R. 640-643), the Commission found (R. 643):

> * * * There is, therefore, no basis for a finding that the carriers are connecting lines within the meaning of section 3(4). Even if the complainants were connecting carriers, the evidence of record does not establish the similarity of circumstances and conditions which justifies equality of treatment.

Pertinent to the issue here on appeal, the Commission concluded that, since Western Pacific was some 490 miles from a physical connection with Union Pacific and Northern Pacific at Portland (R. 625), it could only be a "connecting line" with those carriers at Portland if it participated with them in through routes. (R. 641). The Commission found that the isolated instances of shipments at joint rates relied upon by the examiner, did not, under well-settled precedents, establish the existence of such through routes. (R. 641-643). The Commission cited this Court's opinion in *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, for the "connecting line" test it thus applied.

The three-judge district court unanimously agreed with the Commission's decision that Western Pacific is not a "connecting line" of Union Pacific and Northern Pacific at Portland. (R. 730-734). The district court stated that it was "satisfied that the present

for contending that "connecting line" means different things in the first and second clauses of Section 3(4). And, taken together, they suggest that the framers of this language had in mind a direct physical connection.

Moreover, Section 3(4) must be read with the through route and rate provisions of Sections 1(4) and 15(3) of the Act. Section 1(4) requires railroads "to establish reasonable through routes with other carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto". If a railroad refuses to do so, the Commission may require it to do so pursuant to Section 15(3) "whenever deemed by [the Commission] to be necessary or desirable in the public interest." However, the enactment of Section 1(4) and Section 15(3) in the Hepburn Act of 1906 (34 Stat. 584, 589) in no way changed the right of a railroad to refuse to join in a particular through route so long as that refusal does not violate some law or is not proven otherwise "necessary or desirable in the public interest". As stated by the Commission in *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767, 774 (1955):

> * * *, there is nothing in the act that requires a railroad to establish through routes via all possible junctions or by way of all rairoads or water lines with which it might connect, or between all points or areas which might be reached through those connections. On the contrary, the law is definitely that a carrier has the initial duty and the right to select the through routes over which it holds out to transport through traffic and par-

ticipate in the through rates. It may be that the routes it establishes are not reasonable or that its failure to establish other routes may be unreasonable or otherwise unlawful, but such questions require an administrative determination. Short of such a determination and an order requiring the establishment of additional routes, a railroad or water carrier may not be forced to participate in a through route to which it has not agreed, either expressly or impliedly, and which it does not recognize as a through route.

The law imposes certain obligations upon a carrier which joins with its connecting carrier in establishing a through route. It is not unreasonable for such a carrier to refuse to assume those obligations over all routes, and it cannot be required under the law to assume those obligations over a particular route merely because a shipper or connecting carrier selects it. In this connection it is noteworthy that for many years the duty imposed by section 1(4) upon common carriers by railroad included the "duty to establish through routes," and it was not until 1940 that Congress deliberately modified that paragraph so as to restrict the provision to "reasonable through routes."

As compared with the carriers' obligations and the Commission's authority inherent in the statutory scheme of Sections 1(4) and 15(3), the pertinent provision of Section 3(4) is much narrower in scope. Section 3(4) does not speak of "routes", but only of "rates". It is specifically limited to "connecting lines" whereas Section 1(4) is not. And, it is specifically aimed at "discrimination between" such connecting lines as to rates. Thus, it assumes as a condition

precedent the existence of the connection (physical or business) which Sections 1(4) and 15(3) aim at establishing.

It is this relationship of Section 3(4) to Sections 1(4) and 15(3) that underlies the invalidity of the appellants' contention. Before the Commission, they sought relief under Sections 1(4) and 15(3), as well as under Section 3(4). They failed to prove their Section 1(4) case and have abandoned it. As noted above, they contend that the Congress used "connecting lines" "to describe a continuous series of lines where the traffic on one could physically move onto the tracks of the others." This would mean, for example, that not only would Western Pacific be a "connecting line" at Portland but so also would be Santa Fe which connects with Western Pacific at Stockton.[2] It would mean that New Haven, with its western terminus in New York City, is a "connecting line", via various railroads whose tracks connect physically, with every western railroad. In other words, appellants are contending that Section 3(4) may be invoked whenever a railroad shows that it connects via one or more intermediate railroads with another railroad at some distant point where the latter has entered into a joint rate and through route with a third railroad but has not done so with a possible multi-carrier route which includes the complaining railroad.

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[2] It should be noted that, with obvious inconsistency, counsel for appellants was not willing to concede this necessary result during oral argument before the district court. (R. 682).

The result, assuming the requisite similarity of circumstances and conditions, would be to largely eliminate any need for carriers (or shippers) to seek the establishment of through routes and joint rates under Sections 1(4) and 15(3). We submit that reading Section 3(4) in statutory context, no such effect can be given to its prohibition of rate discrimination between "connecting lines".

A. *Neither common law nor the legislative history of Section 3(4) as enacted in the Act to Regulate Commerce of 1887 supports the appellants' concept of "connecting line".*

Section 3(4) derives from the original Act to Regulate Commerce of 1887 (24 Stat. at 380); Section 3, paragraph 2, of which provided pertinently that "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines * * *".

It is clear from this Court's decision in *A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U.S. 667 (1884), only three years before the 1887 Act, that neither common law nor State statutory developments presaged a concept of "connecting line" such as the appellants would now find in Section 3(4). In that case, this Court held that the right of a railroad under a

state constitution to "connect with * * * any other railroad" embraced only the right to a physical connection, not "the right of connecting business with business" (110 U.S. at 679). There, the D. & N. O. brought suit to compel the Santa Fe to unite with D. & N. O. in through transportation at through rates on the same terms and conditions as Santa Fe had with the Rio Grand at Pueblo, Colorado. The D. & N. O. connection with the Santa Fe was 1500 feet from the Rio Grande's connection, but the D. & N. O. was charged local rates by the Santa Fe rather than the lower divisions of through rates with the Rio Grande. The Court, after noting that the common law prohibited a railroad from discriminating "unreasonably" in favor of or against a connecting line (110 U.S. at 667) went on to hold (110 U.S. at 684):

> * * * The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fe, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. *When a business connection shall be established* between the Denver & New Orleans Company and the Atchison, Topeka & Santa Fe at their junction, *and a continuous line formed*, different questions may arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of

> law, the prices charged by the Atchison, Topeka & Santa Fe, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande. (emphasis added).

The Court went on to find that no American cases hold that the common law requires that a railroad "must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly" (110 U.S. at 685).

Despite the clearly contrary opinion of this Court in *A. T. & S.*, *supra*, which they ignore, the appellants have constructed an elaborate argument to the effect that pre-1887 Federal, State, and English statutes had already developed the concept of "connecting line" which they now urge and that the Congress intended to adopt that concept in Section 3(4)'s prohibition of rate discrimination between connecting lines. We submit that appellants have wholly misread this history.

It is true that in 1866, Congress *authorized* railroads to connect with other railroads "so as to form continuous lines", for the purpose of "exempt[ing] such a course from local interference or prohibition, on the part of State or municipal legislation" (App. br. p. 24). However, as noted above (*supra*, p. 16), this Court interpreted similar statutory rights of railroads to "connect" as a right to make a physical connection, which certainly does not suggest any such

concept of "connecting line" as appellants now urge. It is also true, as appellants state (App. br. p. 26) that the English Railway and Canal Traffic Act of 1854, sec. 2, provided that:

> * * * *every railway company* * * * *and railway* * * * *company, having or working* [*sic*] *railways* * * * *which form part of a continuous line of railway* * * * *communication* * * * shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways * * * without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered [sic] to the public desirous of using such railways * * * as a continuous line of communication. * * * [Emphasis added]

However, the phrase "railways, * * * which form part of a continuous line of railway communication," which appellants would import into Section 3(4) clearly refers, not to a series of independent railways which physically connect, but to railroads which connect through a line operated by one of them. In their discussion of the Railway and Canal Traffic Act (App. br., pp. 27-28) as not being limited in its coverage to direct physical connection, appellants ignore the concept of the intervening line being "worked" or leased.[3] More importantly, the obviously broader phrase "continuous line of railroad communications" employed in the English statute, was not adopted by

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[3] *E.g.* Leased or "worked" railroads were present in the factual situations in the two cases cited by appellants.

the framers of the language in Section 3(4), who chose, instead, the narrower term "connecting lines". And Sec. 2 of the English statute said nothing, at least in terms, about rate discrimination between connecting lines.

The State decisions cited by appellants (App. Br. p. 29) simply do not establish that by 1887 the words "connecting line" had acquired the content appellants would now attribute to them. These decisions fall into two categories. In the first, the language of the pertinent statutes and/or charters was broader in scope than the phrase "connecting line" in Section 3(4).

In *Mayor and City Council of Baltimore* v. *Baltimore and Ohio Rail Road*, 21 Md. 50, a lateral branch of the B & O ran to Benwood, on the Ohio River, at which point goods and passengers were transported to the station of the Central Ohio road on the opposite bank, by means of a steam ferry. There, the Court, in holding " * * * upon the agreed facts in this record, that the Central Ohio Road is a road connecting with the Baltimore and Ohio Railroad, within the meaning of the Act of 1836, * * * " was interpreting a statute which read, in pertinent part, " * * * to subscribe towards the construction of any lateral, *continuing*, or connecting road * * * " (emphasis supplied). Furthermore, it is relevant to note the following portion of the opinion of the trial judge in that case reproduced at pp. 66-67 of the opinion:

> I understand that there is no denial of the fact that the Central Ohio Rail Road is fairly included within the class of lateral, continuing or connecting roads, to which the above Act applies.

> Further, it is admitted, that this road is now in connection with the Baltimore and Ohio R.R., and it is not denied that this connection is advantageous to the said company.

In *Black, et al.* v. *Delaware & Raritan Canal Co.*, 22 N.J. Eq. 130, 402-403 (1871), rev'd on other grounds, 24 N.J. Eq. 455 (1873), the relevant statute read: "* * * or whose works shall form with their own, continuous or connected lines, * * *." Therefore, the court had no difficulty in stating:

> Railroads can be connected, either directly or by intervening roads. The provisions of the Acts of Pennsylvania show this; their phrase is "connected directly or by intervening roads." In either way they are connected; if directly connected, they are also continuous. And the fact that this act uses the word "connected" after "continuous," for the obvious purpose of adding something to the extent of the provision, shows that the intention was to include roads connected not directly, but by some intervening or connecting road.

See also *Philadelphia and E. R.R.* v. *Catawissa R.R.*, 53 Pa. 20 (1866); *Atchison T. & S. F. R.R.* v. *Fletcher*, 35 Kan. 236, 10 Pac. 596 (1886).

The decisions in the remaining three cases cited by appellants, involving factual situations of railroad connections, turned upon other considerations. *Baltimore & O. R.R.* v. *Wheeling*, 54 Va. (13 Gratt) 40 (1855); *Louisville & N.R.R.* v. *State*, 68 Tenn. 522 (1876); *Fitchburg R.R.* v. *Grand Junction R.R. & Depot Co.*, 86 Mass. (4 Allen) 198 (1862).

Appellants point out (App. br., p. 26) that Senator Cullom, in introducing his revised bill in 1886, stated that:

> The third section is broader and more general in its terms [than the second section, outlawing the long-short haul differential] and * * * contains a general prohibition of every variety of unjust discrimination. * * * The second part of the section is modeled in part upon the English and in part upon similar statutes in several of the States. Its purpose is to require railroads to furnish to connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from "freezing out" a connecting line by refusing to accept traffic from it or deliver traffic to it upon any terms, as has been done. [17 Cong. Rec. 3472 (1886).]

Two things should be noted at this point: (1) Section 3 of Senator Cullom's 1886 bill *did not contain the prohibition against rate discrimination between connecting lines*, which appeared for the first time in the later Conference Report. Thus, when Senator Cullom stated that "The second part of [Section 3] is modeled in part upon the English and in part upon similar statutes in several of the States," the inference is that he found in those statutes only requirements of providing reasonable interchange facilities which would preclude a railroad "from 'freezing out' a connecting line by refusing to accept traffic from it or deliver traffic to it *upon any terms*, as has been done." See also Drinker, *The Interstate Com-*

merce Act, (1909), Vol. 1, pp. 321-322. (2) A requirement of reasonable interchange facilities obviously relates to interchanging traffic with physically connecting lines. In all of this, there is not the slightest suggestion of concern over a railroad's relationships with other railroads with which it did not remotely "connect".

As noted above, the Conference Committee bill in 1886 contained the first (and final) provision that railroads "shall not discriminate in their rates and charges between such connecting lines." The provisions provoked little discussion or explanation, since the 1887 debates, like the 1886 debates, were focused largely upon the long haul-short haul and antipooling provisions of the bill. In fact, the only explanation of this provision that we can find is in the extended remarks of Senator Spooner (18 Cong. Rec. Part I, p. 653; Part III, App., p. 37, 49th Cong. 2d Sess.) as follows:

> The conference committee has added to the bill a few lines in section 3, which, in my opinion, greatly improve the section and the bill. I quote part of the Section italicizing the words added: "Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, *and equal* facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, *and shall not discriminate in their rates and charges between such connecting lines.*"

> The principle embodied in the amendment will serve a wise purpose as a general regulation. Congress long ago imposed the same in a qualified way upon the Union Pacific and the Northern Pacific Companies, and the failure sometimes to observe that corporate obligation has been a detriment to other carriers and to large regions of the country.

It would appear that Senator Spooner's reference to the Union Pacific concerned several provisions of the Pacific Railroad Acts. In the words of this Court, Justice Day, in *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, at 91:

> These acts required the two roads, the Central Pacific and Union Pacific, to be "operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line" (12 Stat. 489, 495, act of July 1, 1862, c. 120, § 12), and in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others . . ." (13 Stat. 356, 362, act of July 2, 1864, c. 216, § 15). They also authorized the consolidation of the roads. * * *
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> * * * *

In other words, the only specific explanation of Section 3(4)'s prohibition of rate discrimination is that it is based upon the principle of the Pacific Railroad Acts which applied to railroads which were intended to, and did in fact, connect physically.

We submit that there is nothing in the language, legislative history, or statutory context of Section 3 (4), or in the common law or statutory milieu in which it was enacted, which remotely supports the appellants' contention that by "connecting line" "Congress apparently intended to describe a continuous series of lines where the traffic on one could physically move onto the tracks of the others." It bears emphasis that almost 75 years elapsed before this contention even occurred to anyone.

B. ***The Atlantic Coast Line case supports the definition of connecting line employed by the Commission and the court below and affords no support for the definitions now advanced by appellants and the Department of Justice.***

The district court agreed with the Commission that for a carrier to be within the meaning of the term "connecting line" in Section 3(4) so as to come under the protection of that Section, the carrier must be (R. 733):

> one which has either a direct physical connection at the common interchange or is one which makes up a "through route" through the interchange point. *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288 at 293 (1932).

In *Atlantic Coast Line R.R.* v. *United States*, 284 U.S. 288, at 293, this Court held:

> The argument is that the Georgia & Florida does not connect, since its own rails do not physically abut on the Clinchfield's rails—the connection being made over the Piedmont & Northern, an

> intermediate carrier. There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route.

The heart of this appeal is appellants', and the Department's, disagreement with the reliance by the Commission and the district court on the above holding of this Court in Atlantic Coast Line as supporting the definition, *supra*. Indeed, they now go further. They assert that *Atlantic Coast Line*, properly construed, actually supports their definition of "connecting line."

Since Western Pacific has no direct physical connection with Northern Pacific or Union Pacific at Portland, the disagreement centers upon the alternative requirement, in the definition here employed, that the complainant participate in a through route *through* the interchange point with the allegedly unlawfully discriminating carrier. And, since Western Pacific admittedly has not participated in such through routes via Portland with Northern Pacific and Union Pacific, appellants and the Department recognize that to prevail here, they must demonstrate that *Atlantic Coast Line* did not merely extend the definition of connecting line beyond direct physical connection to participation in a through route with the discriminating carrier, but also extended that concept to some further point covering Western Pacific's factual situation. To that end, appellants now contend that what this Court meant

in *Atlantic Coast Line* by "through route" was "simply a series of connecting carriers *available* for through transportation service" up to the point of connection with, but not embracing, the discriminating carrier. (App. br., p. 39).[4] This interpretation of *Atlantic Coast Line* is patently unsound.

As all parties here recognize, the origins of *Atlantic Coast Line* go back to 1923 when the Atlantic Coast Line Railroad (ACL) and the Louisville & Nashville Railroad (L & N) sought to lease the Carolina, Clinchfield & Ohio Railway (Clinchfield). As now pertinent, the history of the *Atlantic Coast Line* case, from that beginning, can be found in the opinion of the lower court in that case. *Atlantic Coast Line R. Co.* v. *United States*, 48 F.2d 239 (W.D. S.C. 1931). It is there pointed out that the lease was protested by the Piedmont & Northern (P & N) and the Georgia & Florida (G & F). The Clinchfield connected physically with both the P & N and the Charleston & Western Carolina Railway (C & WC) at Spartanburg, South Carolina. The natural route for traffic coming south from points on the Clinchfield, and beyond its northern terminus was over the C & WC from Spartanburg, through Greenwood, South Caro-

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[4] The Department, specifically injecting an element of consent, similarly contends that *Atlantic Coast Line* substantially reflects the definition "we now offer" that (Dept. br., p. 21):

> a line is a "connecting line" if it is part of a route which connects with the defendant so long as all participants in the connecting route stand ready to offer through transportation between the route and the allegedly discriminating carrier.

lina, to Augusta, Georgia, and other carriers (including the G & F) beyond that point. The P & N had a line between Spartanburg and Greenwood and the G & F proposed to build a line between Greenwood and Augusta, thereby giving the P & N and G & F, together, a connecting line between Spartanburg and Augusta competing with the single line of the C & WC. Therefore, the G & F specifically protested the Clinchfield lease on the ground that it intended to build the Greenwood extension and the ACL, if approval was granted, would discriminate against the G & F in favor of the C & WC (which was operated as part of ACL). 48 F.2d at 242.

The Commission approved the lease, but imposed conditions. Condition 4 prohibited the lessees from causing the Clinchfield to discriminate between carriers "connecting, *or which may hereafter connect*" with the Clinchfield as to through routes and joint rates "between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other." 48 F.2d at 241. Thereafter, without any protest by the ACL (although ACL was invited to appear), the Commission approved the construction by the G & F of the Greenwood extension. *Ibid.*

A total of 337 joint rates over through routes were established by joint tariffs, 304 of which were participated in by both the P & N and the G & F, on traffic moving over the Clinchfield between points at and beyond the Ohio River, on the one hand, and points in

southeastern and Carolina territory, on the other. 48 F.2d at 240. Immediately prior to the opening for business of the completed Greenwood extension, the lessees sought to cancel the applicability of these joint rates over the Greenwood extension of the G & F by publishing tariff restrictions which would exclude the P & N—G & F route between Spartanburg and Augusta from the published through routes and joint rates on traffic moving via the Clinchfield between Ohio River points, on the one hand, and the southeastern and Carolina territory on the other. 48 F.2d at 240-241. The Commission ordered the restrictions canceled, upon complaint, as to 304 of the joint rates.

Appellants and the Department overlook two significant points about the Commission's decision in *Atlantic Coast Line*. First, *both* the P & N and G & F were complainants. 48 F.2d at 240. Second, the Commission accorded different treatment to the 33 rates in the tariffs to which the G & F was *not* a party. The lower court in *Atlantic Coast Line* agreed with that different treatment, holding as follows, 48 F.2d at 245:

> It is argued that the commission was without power to enter the order in question because it is said that the order was in effect the establishment of new and additional through routes without affording a hearing as required by section 15(3) of the Interstate Commerce Act as amended by the Transportation Act of 1920, § 418 (49 USCA § 15(3). *This point was made before the commission and was sustained as to 33 of the 337 schedules originally involved, on the ground*

that these 33 schedules related to tariffs to which the G. & F. was not a party. As pointed out by the commission, however, it had jurisdiction as to the remaining 304 restrictive schedules because their purpose was to restrict the joint rates that would automatically become applicable over the Greenwood extension upon its completion without the filing of additional tariffs or further action by the commission. *These 304 restrictive schedules, therefore, affected existing rates, fares, and charges applicable on traffic, to, from, or over the G. & F. within the meaning of section 15(7) of the Interstate Commerce Act* as amended by the Transportation Act of 1920, § 418, as amended by Act March 4, 1927, § 2 (49 USCA § 15(7). [Emphasis added.]

Before this Court in *Atlantic Coast Line* the United States and I.C.C. offered alternative arguments consistent, as we shall show, with our present interpretation of "connecting lines." The primary argument was that under the conditions of the leasing approval the G & F was a connecting line with the Clinchfield despite the lack of direct physical connection, because of the prior history, commencing with the leasing case, which established the role of G & F as a participating carrier in through routes *with the Clinchfield*, "between the territory north of the Ohio River and the Southeast" and, therefore, within the protection of the lease conditions.[8] This, we contend, is clearly the argument accepted by this Court in the passage

[8] Brief for the United States and the I.C.C., *Atlantic Coast Line R. R.* v. *United States*, No. 88, October Term 1931, pp. 16-18.

from the opinion quoted, *supra*. The alternative argument,[6] quoted by appellants herein (App. br., pp. 36-37), was that should this Court disagree with the G & F's right to complain as a "connecting line," because physical connection is the required standard, then the P & N, a complainant, satisfied that standard, had a right to seek relief, and that relief, to be effective, necessarily and properly covered the G & F's Greenwood extension. Thus, as applied to the instant case, had the Great Northern been a complainant, it could have asserted connecting line status, based upon direct physical connection at Portland, as to through traffic moving over the Bieber route. Of course, when this Court agreed with the Commission and the district court as to the G & F's right to complain as a "connecting line," there was no need to rule on the alternative argument as to the P & N.

The correctness of our interpretation of *Atlantic Coast Line* is most clearly demonstrated by means of answer to the contrary contentions of appellants and the Department. Appellants sum up their contentions at pages 38-39 of their brief. They contend that in *Atlantic Coast Line* the "important point" is that the discriminating carriers (lessees of the Clinchfield) "had never purposefully held themselves out as offering through transportation service over the complainants' lines." (App. br., p. 38). Upon that premise, and their view of the "facts and the arguments" in *Atlantic Coast Line*, they contend that this Court did not refer to the G & F as being part of "a through

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[6] *Ibid.*, pp. 18-19.

route in the sense that, as phrased in *Thompson*,[7] 'the participating carriers hold themselves out as offering through transportation service,' " but, rather, must have been speaking of a through route in the sense of "connecting carriers *available* for through transportation service." (App. br., p. 39). Moreover, they make clear that what they mean by "connecting carriers *available* for through transportation service" is a through route between the G & F and P & N to the point of P & N's connection with the Clinchfield which they compare to the Western Pacific-Great Northern through route to Portland.[8] (App. br., p. 39).

Appellants' "important point," their basic premise, is clearly erroneous. It is the same argument advanced by the lessees of the Clinchfield and, obviously, rejected at every stage of the *Atlantic Coast Line* proceedings. It is the argument that there never was a through route *through* the point of interchange with the Clinchfield because the restrictions were published prior to the opening of the Greenwood extension. (App. br., pp. 34, 38). As appellants recognize (App. br., p. 35), the lessees of the Clinchfield brought this argument to its sharpest focus by contending that the Commission's order violated Section 15(3) by establishing new and additional through routes without a hearing as required by that Section. The district court in *Atlantic Coast Line* rejected that argument in the passage quoted, *supra*. The lessees re-

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[7] *Thompson* v. *United States*, 343 U.S. 549, 557 (1952).

[8] The Department takes the same view (Br., p. 25).

peated their argument in this Court, asserting: [9]

> The Commission seeks to sustain its order on the theory that the restrictive notes *closed existing routes.* The restrictive notes *prevented* the opening of future routes.

The United States and Commission, after pointing out that this contention had been correctly sustained by the Commission as to the tariffs in which the G & F was not a participant, replied: [10]

> Through routes and joint rates named in tariffs which have been filed with the Commission constitute existing routes and rates, although there has been no movement of traffic thereunder. See *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 666.
>
> The action of the Commission did not open new routes, because the restrictive schedules which it ordered cancelled were supplements to tariffs to which the Georgia & Florida was a party.

We submit that this facet of the *Atlantic Coast Line* case, plus the repeated references to the through routes in question as being those between points north of the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other, make absolutely clear the through routes which the parties, the district court, and ultimately this Court, had in mind. Moreover, if as appellants argue, what

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[9] Brief for Appellants, *Atlantic Coast Line R. R.* v. *United States*, No. 88, October Term 1931, p. 48.

[10] Brief for the United States and I.C.C., *supra*, at p. 28.

the parties, the Commission, the district court, and this Court had in mind was a loose concept of "connecting lines" as being physically available service up to, but not through, the point of connection with the discriminating carrier, then the restrictions cancelling the 33 joint rates in tariffs in which G & F was not a participant would never have been sustained.

We agree with appellants that although this Court in *Atlantic Coast Line* was construing the meaning of the terminology in the lease conditions, its interpretation of "connecting lines" is now applicable to that term in Section 3(4). We agree that the interpretation arrived at went beyond mere direct physical connection and submit that this Court intended to encompass participants in through routes, as later specifically defined in the *Thompson* case, *supra*. But, we further submit that this Court did not intend, and had no need, to push that definition to the extremes advocated by appellants and the Department.[11]

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[11] The Department asserts (Dept. br., p. 25, n. 15), that the subsequent Commission decision in *Georgia & F.R.* v. *Atlantic Coast Line R. Co.*, 191 I.C.C. 489 (1933) is contrary to our interpretation of Atlantic Coast Line. It is sufficient answer to here note that in *Georgia & F. R.* it does not appear that anyone raised the question of complainants' connecting line status, that the P & N was a complainant, and that, as appropriate to the discrimination charged, the Greenwood extension had been completed and direct physical connections were present.

C. ***Decisions subsequent to Atlantic Coast Line provide no support for appellants' novel concept of a "connecting line".***

Section 3(4) defines the term "connecting line" as including "the connecting line of * * * any common carrier by water subject to [Part III of this Act]." Appellants seek support for their novel definition of "connecting line" from the Commission's reports in *American Barge Line Co.* v. *Alabama G. S. R.R.*, 296 I.C.C. 247 (1955), 303 I.C.C. 463 (1958), and 306 I.C.C. 167 (1959), and related judicial decisions (App. br., pp. 43-48). From these materials, they argue that since barge lines were held to be connecting lines of railroads under Section 3(4) "though intermediate facilities were necessary for transfer of the grain from barge to train," it follows that "no direct physical connection is necessary in order for there to be 'connecting line' status", but that "there need be only a series of connecting carriers capable of, and available for, handling through service but prevented from doing so by the discriminatory rates" (App. br., pp. 47-48). The argument wholly distorts the Commission and court decisions upon which it is based.

Since 1940, the Congress in Section 3(4) has defined "connecting line" to include the "connecting line of any common carrier by water." Obviously, a water carrier does not connect with a railroad as railroads connect with each other (*i.e.* by connecting tracks). Nevertheless, a practical meaning must be given to the statutory concept of a "connecting line" of a water carrier, and this was one of the problems involved in the American Barge Line cases. In brief, the Com-

mission concluded that a railroad and a barge line should be treated as connecting lines at any point where they so meet that it is practical to transfer cargo from one to the other, *i.e.*, a distance of a few feet or yards. The Commission described such transfer facilities as follows (306 I.C.C. at 170, 171):

> * * * berthing facilities for barges are provided, the docks are served by rail tracks, and with the equipment available under the arrangements with stevedores it is possible for grain to be transferred to cars for rail switching or line-haul movement.
>
> * * * *
>
> Elevators with docking space for barges, served directly by railroads and equipped to unload barges, are situated at Port Cargill, et cet. * * *

A similar view was expressed by the three-judge court which reviewed the above-quoted Commission decision in *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411, 419 (N.D. Ala. 1959) affirmed as *State Corp. Comm. of Kansas* v. *Arrow Transp. Co.*, 361 U.S. 353 (1960) as follows:

> The contention is advanced with apparent seriousness by some of the intervening defendants that Arrow is not a connecting carrier in relation to the railroads which serve the Tennessee River ports. This argument is wholly without merit. At each of the Tennessee River ports there are facilities by which grain can be transferred directly from barges into rail cars, but the normal type of transfer is through an elevator. We hold that Arrow is a connecting carrier of the out-

> bound rail carrier when it delivers grain in its port-to-port service to a river elevator or other unloading facility which has a rail connection for the subsequent reshipment of that grain. * * *

In brief, the fact that a river-bank grain elevator may serve to "connect" a water carrier and a railroad for the purposes of Section 3(4), does not remotely suggest that "connecting line" status may be found via hundreds of miles of the tracks of other and independent railroads.

Appellants rely upon *Chicago, I. & L. Ry.* v. *United States*, 270 U.S. 287 (1926). Taken in its most favorable form to plaintiff, this case simply holds a direct physical connection is not necessary—a point with which the Commission and lower court here agreed on the basis of the later *Atlantic Coast Line* case.

Factually, in the *Chicago, I. & L.* case, the South Shore had through routes and joint rates with the Lake Erie, and a reciprocal switching arrangement with that carrier at Michigan City. Three other carriers entering Michigan City did not all physically connect with the Lake Erie or each other but, nevertheless, had reciprocal switching arrangements with that carrier and each other.[12] These three refused to enter into joint rates and through routes and reciprocal switching with the South Shore. Legally, the South Shore did not seek joint rates and through routes with the three carriers and the case presented

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[12] *Chicago, Lake Shore & S. B. Ry. Co.* v. *L.E. & W. R.R. Co.*, 88 I.C.C. 525, 526 (1924).

no question of whether they were "connecting lines" under Section 3(4) for that purpose.

The case simply presented the question of whether three of four carriers, all four of which did not physically connect each with the other yet reciprocally switched for each other, can refuse to do so for a fifth carrier which physically connects and reciprocally switches with one of the four. Assuming, *arguendo*, the validity of the analogy, the point of the holding, as here pertinent, would seem to be that the carriers having waived any requirement of physical connection for connecting line status as to some cannot refuse to do so for all. That is not this case. Moreover, such cases as this which involve switching or terminal services are not really in point. This is clear from this Court's decision in *Louisville & Nash. R.R.* v. *United States*, 238 U.S. 1, 18-19 (1915), which distinguishes the situation where a carrier is compelled to make through routes and joint rates from the stiuation where it is directed to render switching services without discrimination. See also *Atlantic Coast Line R.R. Co.* v. *United States*, 205 F. Supp. 360, 365 (M.D. Ga. 1962), affirmed 371 U.S. 6 (1962).

Appellants contend that *Denver & R. G. W. Co.* v. *Union R.R. Co.*, 351 U.S. 321 (1956), supports their view that a through route through the connecting point is not essential to a finding of discrimination under Section 3(4). (App. br., pp. 52-53). But, again, we do not contend it is essential *if* direct physical connection is present. Direct physical connection was present in that case. The remaining cases cited

by appellants (App. br., pp. 53, *et seq.*) are so clearly irrelevant to the issue that specific discussion is not merited.

Finally, the Department of Justice (Dept. br., pp. 28-30) contends that the definition of "connecting line" applied by the Commission and the court below is inconsistent with the Commission's own purpose in authorizing the construction which created the Bieber route. *Great Northern Ry. Co. Construction*, 166 I.C.C. 3. Admittedly, a purpose of the Commission was to authorize competitive rail service from California to the north. We fail to see how the Commission's purpose could modify the Congressional definition of "connecting line," and we note that such a possibility did not occur to Western Pacific until about 30 years after such construction was authorized.

II. This Court Should Not Resolve the Issue of Similarity of Circumstances and Conditions

The Commission concluded both that Western Pacific was not a "connecting line" within the meaning and protection of Section 3(4) and, even if it were, that it had not established the requisite substantial similarity of circumstances and conditions to entitle it to relief under that Section. The district court affirmed the first conclusion and, therefore, found it to be unnecessary to rule on the primarily factual issues raised as to the second conclusion (R. 731-732). Appellants now urge that, should this Court find that the Commission and district court erred on the connecting line issue, remand is unnecessary and this Court should proceed to analyze the record and rule

on the issues raised as to the Commission's conclusion of insufficient similarity of circumstances and conditions to warrant relief. (App. br., part II, pp. 64, *et seq.*) We submit, with the apparent concurrence of the Department (Dept. br., pp. 13, n. 8, 31), that if this Court finds for appellants on the connecting line issue, the Court, in accordance with its normal practice, should go no further, but rather, remand the matter to the district court. However, if this Court concludes to treat with the remaining issues, then we adopt for our argument the materials contained on those issues in the brief of appellee railroads.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

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Interstate Commerce Commission.

SEPTEMBER 1965

APPENDIX

Section 1(4) of the Interstate Commerce Act, 54 Stat. 899, 49 U.S.C. 1(4), provides:

> It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15(3) of the Interstate Commerce Act, 54 Stat. 911, 49 U.S.C. 15(3), provides:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by car-

riers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

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